PILLAI & ANOR. v. INDUFELA CO. & ORS.

[O.C.J. (D'Cotta J.) January 30, 1980]
[Singapore — Civil Suit No. 4517 of 1975]

Employment — Workmen employed by one employer and hired out to another — Injury in the course of employment — Negligence of co-workman — Test to determine employer at material time — "Entire and absolute control."

Torts — Negligence — Injury in the course of employment.

The plaintiffs in this case claimed against the defendants for damages for personal injuries sustained by them in the course of employment as a result of an accident caused by the negligence of the first and/or second defendants, their servants or agents in the making of a dry dock and/or of the third defendants their servant or agent in the operation of a crane.

Quantum of damages was agreed at $14,000 for the first plaintiff and $162,700 for the second plaintiff.

The plaintiffs were employed by the first defendants, labour sub-contractors and at the material time were hired to the second defendants ("the hirers") the main contractor in the Sembawang Dry Dock Project. The accident arose in the course of the plaintiffs' attempt to dismantle a scaffold which was situated at the work site of the hirers at Sembawang. The scaffold collapsed causing injuries to the two plaintiffs.

The facts revealed that the accident was caused by the crane driver who operated the crane without a signal being given and his tugging and jerking of the frame of the top rung of the scaffold caused it to rock from side to side till it eventually overturned. The crane driver was employed by the third defendants ("the general employers") but supplied to the hirers pursuant to a contract. The general employers owned the crane.

The issue before the court was in whose employ was the crane driver at the time when he operated the crane which resulted in the plaintiffs sustaining their injuries.

Held: (1) the onus of proof rests on the general or permanent employers to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer to the hirer who for the time being had the advantage of the service rendered; in this case the burden of proof had not been successfully discharged;

(2) entire and absolute control is necessary in order to transfer liability from the shoulders of the employer who engages, pays and regularly employs and can alone dismiss him, on to the shoulders of those who have hired the servants' services from his regular employers;

(3) the injuries sustained by both plaintiffs were caused by the negligence of the crane driver when operating the crane and at that time he was under the employ and control of the general employers, i.e. the third defendants.

Cases referred to:-

(1) *Nicholas* v. *Sparkes & Son* [1945] K.B. 309.
(2) *Donovan* v. *Laing* [1893] 1 Q.B. 629.
(3) *Mersey Docks and Harbour Board* v. *Coggins & Griffiths (Liverpool) Ltd.* [1946] 2 All E.R. 345.
(4) *Karuppan Bhoomidas* v. *Port of Singapore Authority* [1978] 1 W.L.R. 189; [1978] 1 M.L.J. 49.

CIVIL SUIT.

Karuppan Chettiar for the plaintiffs.

C.B. Yeow for the first defendants.

Tan Kok Quan for the second defendants.

Ng Kian Fong for the third defendants.

K.K. Tang for third party.

Cur. Adv. Vult.

D'Cotta J.: The 1st and 2nd plaintiffs claim against the defendants for damages for personal injuries and consequential loss and expense suffered by the 1st and 2nd plaintiffs occasioned to them in the course of their respective employment by the 1st and/or 2nd defendants as a result of an accident on the 13th day of December 1974 in the course of the making of a dry dock at Sembawang and caused by the negligence of the 1st and/or 2nd defendants, their respective servants or agents in the making of a dry dock and/or of the 3rd defendants their servant or agent in the operation of a crane.

Counsel agreed that the quantum of damages in respect of the 1st plaintiff, Raghavan Pillai (hereinafter called "the 1st plaintiff") be fixed at $14,000 and that of the 2nd plaintiff, Mohamed Kunju, at $162,700.

The *dramatis personae* comprise: the two plaintiffs employed by the 1st defendants, labour sub-contractors and who on this particular occasion were hired to the 2nd defendants (hereinafter called "the hirers") the main contractor in the Sembawang Dry Dock Project; Vasudheva Kurup (DW3) (hereinafter called "the rigger") who is now employed by the hirers as a rigger but who, at the time was in the employ of the 1st defendants but hired to the hirers, and Saad bin Ludin (DW5) the crane driver who was employed by the 3rd defendants (hereinafter called "the general employers") but supplied to the hirers pursuant to a contract — see AB62 and AB65. The general employers owned the crane.

The accident arose in the course of the plaintiffs' attempt to dismantle a scaffold which was situated at the work site of the hirers at Sembawang. The scaffold collapsed causing injuries to the two plaintiffs.

The overall dimensions of the scaffold are 12′ x 4′ x 30 ; it is made up of 15 pieces of 6′ x 4′ standard shoreload unit frames in three rows of five unit frames as shown in Exhibit P1. The plaintiffs allege that the accident was caused by the negligence of one of the defendants and/or their respective agents or servants.

The first question that arises is "whether the scaffold was a safe structure for the workmen i.e. the plaintiffs and others to work on".

In considering this, it is pertinent to note that the scaffold was being dismantled and was not being used by the workmen in carrying out any particular work at the time of the accident.

K.Y. Chen, B.C.E., M.Sc, P.E. of the University of Singapore and T. Balendra, Ph.D. also of the University of Singapore (Faculty of Engineering) PW1 and PW2 respectively said in their report — Exhibit P1 — that as a result of their study they found the scaffold unsafe as it could not safely resist the normal minimum lateral force expected during the course of dismantling. While on this subject, it must be appreciated that PW1 and PW2 have very little practical experience in heavy civil engineering construction work involving the use and operation of scaffolds. Furthermore, there is nothing in the evidence to suggest that they were aware that the scaffold was being dismantled at the time of the accident. However, as against that, DW1 Robert R. Sauter with 15

years experience in heavy civil engineering works was of the opinion that the scaffold was a safe structure at the time when the workers were dismantling it.

According to the evidence, the 1st plaintiff (PW3) said that when he climbed up the scaffold he did not feel any vibration and that it was very safe and steady. The rigger in charge of the operation on that day also said that before he climbed up the scaffold he shook it at ground level and was quite satisfied that it was steady. Even the crane driver said that the scaffold was steady. Robert Sauter was asked in cross-examination what was the normal method of dismantling a scaffold and his reply was to use a hammer and knock the pins out of the joints first in order to free the joints, then a crane could be used to lift the frame from the ground. Even John Sheridan (DW4) with 12 years' experience in crane operations said in cross-examination that he did not consider lifting a frame from the scaffold a dangerous operation neither did he think constant supervision was necessary although generally there is somebody in charge.

At the request of counsel for all the parties the court visited the work site of the hirers at Pandan Yard. For the benefit of the court, a demonstration of a similar crane lifting a frame from the scaffold was performed. During the course of the demonstration the frame was removed by the crane in two separate ways: — first of all by fixing each end of the sling of the crane to each end of the frame, and secondly by winding the sling round the centre of the frame. In performing the first method, the crane lifted the frame with consummate ease; in performing the second method however the sling slipped to one end of the frame and as the crane driver continued tugging, one end of the frame was released from the socket but the other end remained fixed. In attempting to release the fixed end, the crane driver continued tugging the frame and this resulted in the scaffold rocking from side to side and eventually collapsing.

As a result of my observations, I was satisfied that —

(a) the scaffold was a safe structure for the workmen to work on for the purpose of dismantling; and

(b) the method employed for dismantling the scaffold was quite safe.

We will now ascertain from the evidence how the accident occurred. According to the 1st plaintiff he said he did not know whether he was required to dismantle or to heighten the scaffold as no specific instructions were given to him; all he was asked to do by the rigger was to climb up the scaffold which he did. He saw the rigger placing the sling of the crane in the centre of the frame on the top rung of the scaffold whereupon the crane driver started to lift. At this stage he saw the sling which the rigger had placed in the centre of the frame slipping towards the left and i.e. towards the right of the scaffold from the crane driver's point of view. The right vertical side of the upper portion of the frame loosened whereas the left vertical side was taut. The crane driver then tugged at the frame in an attempt to loosen the left vertical side. He saw this and signalled to the crane driver by holding up his right hand and shouting three times "jangan tarek". The crane driver continued jerking and tugging at the frame of the top rung of the scaffold thus causing one end to get loose. The other end was still affixed in its socket and the continual tugging of this frame, despite warning shouts by the 1st plaintiff, resulted in the scaffold collapsing. The two plaintiff who were on the scaffold fell to the ground and sustained injuries.

The 2nd plaintiff, Mohammed Kunju, did not give evidence at the trial as he is at present in India suffering from paraplegia and is not ambulant.

The rigger in his evidence said he was instructed to dismantle the scaffold. Before he started work he was joined by two or three workers two of whom were the 1st and 2nd plaintiffs. He climbed to the top of the scaffold by the rung from the centre portion. He said his normal practice was to fix the sling to the centre of the top rung of the frame to be dismantled; then the workers, one on each side of the scaffold would manually lift the frame in order to release it from the joints and once this has been done the crane would lift the frame up. As soon as the frame is freed from the joints the crane driver will be told to lift the frame presumably by the rigger or any of the workmen or even by someone appointed to give the signal. On this particular day, the rigger went on to say, that he and another worker removed the cross bracings from the joints and after fixing the sling to the centre of the top rung of the frame he proceeded to descend; as he was about to touch the ground he heard someone shouting that the scaffold was about to collapse. He caught hold of the pipe of the scaffold and fell to the ground when the scaffold collapsed.

In re-examination the rigger said he knew how to work on his own in dismantling a scaffold. It was a routine job in Sembawang Shipyard. By routine he meant not uncommon. He had worked with both plaintiffs not only in dismantling but other types of jobs as well in Sembawang Shipyard. He further said that a signal is required before a frame is lifted from the scaffold.

The crane driver however in evidence said that he did not operate the crane at all. He saw the rigger and another worker pulling out the pins from the right and left side braces of the scaffold. He said he merely sat in his crane cabin and waited for instructions. After the pins had been removed the scaffold was shaky and began to tilt from one side to another. He shouted and the scaffold collapsed. He attributed the shaking to the fact that the workers were working on the top of it. The upper rung of the scaffold which was attached to the crane by means of the sling was being lifted by two workers manually: in other words, it was a manual operation. The crane driver went on to say that the crane was not involved in the collapse of the scaffold. He denied that the 1st plaintiff shouted to him three times not to pull. He stated that he did not operate the crane and that the engine of the crane was on as it was part of his instructions to leave the engine on at all times.

It is pertinent to note that the engine of the crane was functioning and the crane would not have jerked at the frame of the scaffold unless somebody had

operated it. The only person in the cabin was the crane driver himself; nobody else was around and the only inference that can be drawn is that the crane was operated by him. I did not believe him when he said he did not operate the crane. I rejected his evidence on this point. In addition to all this, the 1st plaintiff stated that he shouted out to the crane driver three times not to tug at the frame as the scaffold was beginning to rock. He was never challenged on this statement in the cross-examination. The rigger also confirmed that he heard shouts and quite obviously this must have been the 1st plaintiff's shouts as they were both on the scaffold within close proximity of each other. Again according to the evidence of the 1st plaintiff and the rigger, the crane driver operated the crane without a signal having been given. I accept the evidence of the 1st plaintiff and the rigger as to how the accident occurred.

In my view I find that the cause of the accident was due to the fact that the crane driver operated the crane without a signal being given and his tugging and jerking of the frame of the top rung of the scaffold caused it to rock from side to side till it eventually overturned.

The next question to consider is, was the crane driver at the time he operated the crane acting on the instructions of the general employers or the hirers. The crux of the matter is in whose employ was he at the time when he operated the crane which resulted in the two plaintiffs sustaining their injuries. The test for ascertaining this i.e. where workmen are employed by one employer and hired out to another, was laid down by the Court of Appeal in *Nicholas* v. *Sparkes & Son*[1] as follows: —

"In the doing of the negligent act was the workman exercising the discretion given to him by his general employer or was he obeying or discharging a specific order of the party for whom on his employer's direction, he was using the vehicle."

Scott L.J. in delivering the judgment of the Court of Appeal referred to the case of *Donovan* v. *Laing*,[2] where Lord Justice Bowen answered the question as follows: —

(1) the employer is the person who has the right at the moment to control the doing of the act i.e. the act which causes the damage; and

(2) the hirer of the carriage with driver is not liable unless he actively interferes with the driving i.e. in the exercise by the driver of his art.

Nicholas v. *Sparkes* was affirmed by the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins & Griffiths (Liverpool) Ltd.*[3] The facts of this case which are very similar to our present case are as follows: A firm of stevedores had hired from the Mersey Docks and Harbour Board the use of a crane together with its driver to assist in loading a ship lying in the Liverpool docks. The contract was subject to the board's regulations, regulation 6 of which contained the clause: 'The drivers so provided shall be the servants of the applicants.' The driver in question was a skilled workman engaged and paid by the board, and the board alone had power to dismiss him. The stevedores directed what operations should be executed by him, but they had no authority to direct how he should work the crane. Owing to the negligence of the driver, a checker employed by the forwarding agents who had engaged the stevedores was injured in the course of his employment. The question to be determined was whether in applying the maxim *respondeat superior*, the general employers of the crane driver or the hirers were liable for his negligence. It was contended by the board that, under the terms of the contract between the board and the stevedores, the stevedores were liable.

It was held: (1) the question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver.

(2) the board, as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The board were therefore liable for his negligence.

Lord Porter in his judgment at page 351 had this to say: —

"I think that the most satisfactory (test) by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident."

In our case, the 3rd defendants were the general employers of the crane driver and the 2nd defendants the hirers.

Robert Sauter (DW1) when asked in whose employ the crane driver was had this to say in cross-examination: —

"*Q.* He is subject to the orders of the second defendants.

A. Yes except that he can refuse to carry out an order if he thinks it unsafe or outside the capacity of the crane.

Q. On the day in question, he was told by the plaintiff 3 times not to pull but despite that he did so and there was no one giving orders.

A. In that case his decision is final.

Q. No one tells the crane driver how to operate the crane.

A. *Yes.*"

John Y. Sheridan (DW4) Managing Director of 3rd defendants with more than 12 years' experience in crane operation, in evidence-in-chief had this to say: — "Our crane driver was under the supervision and control of the 2nd defendants as far as the dismantling of this scaffold is concerned". Under cross-examination this is what he said: —

"*Q.* Was crane driver entirely under the control of the second defendants.
A. Yes.
Q. Would he lift any load if he considered it unsafe to do so.
A. They are instructed if the lift is dangerous i.e. to the crane driver or other people, not to do so."

The crane driver in evidence-in-chief said he was working under the control of the hirers and during the time he worked for the hirers, Kurup would tell him what to do and when to move the crane. If the load was too heavy he would refuse to lift it. Under cross-examination he was asked and I quote: —

"*Q.* Was there ever an occasion while employed by the second defendants that you refused to lift.
A. Yes.
Q. How many times.
A. Two or three times.
Q. Other than that you obeyed the instructions of the second defendants.
A. Yes."

In re-examination he said he would refuse to carry out a lift if it was beyond the capacity of the crane. It is quite obvious from this that the hirers could tell the crane driver what work to do but they could not tell him how it was to be done — the final discretion was his. He could in his own discretion refuse to perform a lift if the load was too heavy or if it would cause injury to other people: In other words in the doing of the negligent act he was exercising his own discretion as driver — a discretion which had been vested in him by his regular employers when he was sent out with the vehicle — and he made a mistake with which the hirers had nothing to do.

The general employers of the crane driver had failed to discharge the burden of proving that at the time of the accident the hirers had such control over the crane driver that they were liable for his negligence. The specific instructions given by the general employers to the crane driver were that he was not to lift if the load was too heavy or if it would cause injury to other people.

On the authority of *Karuppan Bhoomidas* v. *Port of Singapore Authority*,[4] it was held following the *Mersey Dock's* case that the onus of proof rests on the general or permanent employers to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer to the hirer who for the time being has the advantage of the service rendered. In this case, the burden of proof has not been successfully discharged. It was further held in *Karuppan Bhoomidas'* case that partial control by the hirer is not enough and that entire and absolute control is necessary in order to transfer liability from the shoulders of the employer who engages, pays and regularly employs and can alone dismiss him, on to the shoulders of those who have hired the servants' services from his regular employers.

In my judgment, I find as of fact from the evidence that the injuries sustained by both plaintiffs were caused by the negligence of the crane driver when operating the crane and at that time he was under the employ and control of the general employers i.e. the 3rd defendants.

In the circumstances there will be judgment for both plaintiffs against the 3rd defendants for the amounts agreed upon and costs. The claim against the 1st and 2nd defendants is dismissed with costs.

Order accordingly.

Solicitors: *Murphy & Dunbar; C.B. Yeow & Co.; Lee & Lee; Ng Kian Fong & Co.; Tang-Tan & Tan.*

THE "AUGUST 8TH" COSTAS BACHAS v. "AUGUST 8TH" (OWNERS)

[O.C.J. (Choor Singh J.) February 4, 1980]
[Singapore — Motion in Admiralty in Rem No. 37 of 1978]

Practice and Procedure — Admiralty action — Whether O. 14 procedure available — R.S.C. 1970, O. 14.

This was an application by the defendants to set aside the judgment entered against them on July 31, 1978 in favour of the plaintiff for the sum of $95,909.18. The main issue at the hearing was whether or not Order 14 procedure was available in an Admiralty action.

Held: Admiralty actions are not expressly excluded in our Order 14 and therefore the procedure under Order 14 was available to the plaintiff.

Case referred to:-

(1) *Bolt & Nut Co.* v. *Rowlands & Co. Ltd.* [1964] 2 Q.B. 10.

MOTION IN ADMIRALTY *IN REM.*

Hariadass Ajaib for the plaintiff.

P. Selvadurai for the defendants.

Cur. Adv. Vult.

Choor Singh J.: This is an application by the defendants to set aside the judgment entered against them on July 31, 1978 in favour of the plaintiff for the sum of $95,909.18.

The facts are these. The plaintiff issued the writ in these proceedings on January 13, 1978 claiming wages and other emoluments due to him together with disbursements made by him as the master of the motor vessel "AUGUST 8TH". The defendants entered appearance on February 2, 1978. The plaintiff then took out a summons in chambers for liberty to sign judgment against the defendants under Order 14. This application was opposed by the defendants before the Registrar who gave leave to the defendants to defend the action on condition that the defendants provided security for the sum of $95,909.18 within 14 days failing which the plaintiff was to be at liberty to enter final judgment against the defendants for the sum claimed in the writ of summons. This Order was made by the Registrar on May 10, 1978. The defendants failed to comply with the Order and judgment was entered for the plaintiff against them on July 31, 1978.

The defendants did not appeal against the order